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IN THE

Supreme Court of the United States

OCTOBER TERM 1982

COASTAL PETROLEUM COMPANY,
Petitioner,

v.

MOBIL OIL CORPORATION,
THE FLORIDA DEPARTMENT OF NATURAL RESOURCES, and
THE BOARD OF TRUSTEES OF THE
FLORIDA INTERNAL IMPROVEMENT TRUST FUND,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Court of Appeals for the Eleventh Circuit should be summarily reversed because it relied on the dissenting opinion in *Smith* v. *Kansas City Title & Trust Co.*, 255 U.S. 180 (1921), a decision which has never been reversed or weakened and has been followed by this Court as recently as 1978.

2. Where a federal question of navigability is the determinative issue in a litigation involving title to land under state law, and is properly pled as an element in the complaint, does the case arise under federal law for purposes of jurisdiction under 28 U.S.C. § 1331?

PARTIES BELOW

All the parties at all prior stages of this litigation are listed in the caption. The petitioner, Coastal Petroleum Company, is a subsidiary of Coastal Caribbean Oils and Minerals, Ltd., a Bermuda Corporation. Petitioner has no other affiliates or subsidiaries.

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OPINIONS BELOW

The opinion of the Court of Appeals is reported at 671 F.2d 419 (1982). The opinion of the District Court is unreported. Both opinions are reproduced in the Appendix.

JURISDICTION

The judgment of the Court of Appeals was entered on March 4, 1982. A timely petition for rehearing was denied on April 21, 1982. A timely application for an extension of time to file this petition was granted by Mr. Justice Powell on July 7, 1982, extending the time within which to file this petition to and including September 3, 1982. Jurisdiction in the district court was invoked under 28 U.S.C. § 1331. Jurisdiction in this court exists under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

United States Code, Title 28 § 1331 provides:[1]

> The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

STATEMENT OF THE CASE

The Court of Appeals in this case followed and adopted the dissenting opinion in *Smith* v. *Kansas City Title & Trust Co.*, 255 U.S. 180 (1921), despite the fact that the majority opinion in that case has never been overruled or weakened by any subsequent decision and despite the fact *Smith* is indistinguishable from this case. The grounds of the decision below were not argued, briefed or suggested by any party but were announced *sua sponte* by the Court.

The issue here is clear and simple—does this case "arise under" federal law so as to sustain jurisdiction in the federal courts under 28 U.S.C. § 1331, the federal question statute. Certiorari should be granted and the judgment below reversed summarily on the authority of *Smith, supra.* Alternatively, if this Court feels that the decision in *Smith* should be reexamined, certiorari should be granted and the case set for argument.

This case began in 1976 as a suit in a Florida state court between Coastal Petroleum Company and Mobil Oil Corporation when Mobil filed a declaratory judgment suit for judicial construction of a submerged lands exploration agreement between Mobil and Coastal. Coastal responded, in part, with a counterclaim asserting that Mobil had converted phosphate and uranium from lands owned by Florida and leased to Coastal. Coastal also claimed that Mobil had injured Coastal by concealing information Mobil was obligated to provide under the exploration agreement. Coastal brought the Board of Trustees

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[1] When this case began, 28 U.S.C. § 1331(a) included a $10,000 "amount in controversy" requirement which was deleted by Congress in 1980.

of the Internal Improvement Trust Fund of the State of Florida into the suit as an interested party. Mobil then replied by amending its complaint to assert a prayer for a declaration of its rights under a deed from the Trustees in a certain parcel in which Coastal and the Trustees also claimed rights, a parcel which was coursed by the Peace River. Mobil's rights, if any, in that parcel depended on a showing that the Peace River was not navigable at the time Florida became a State.[2] Recognizing the central importance of the navigability issue, Mobil's amended complaint specifically alleged that the Peace River was "not navigable in fact" at statehood.

After Mobil filed its new claim, Coastal and the Trustees removed the case to the United Stated District Court for the Northern District of Florida, asserting that Mobil's claim arose under federal law and presented a federal question, *i.e.*, the navigability of the Peace River, and that the District Court had original jurisdiction under 28 U.S.C. § 1331 and removal jurisdiction under 28 U.S.C. § 1441. Mobil filed a motion to remand, arguing the claim did not "arise under" federal law. Judge Stafford denied the motion in an opinion holding that jurisdiction existed since the navigability issue was "to be determined by federal law" and that "Mobil's rights may be defeated or supported if federal law is given one construction or effect." App. at 2a-3a.

Thereafter Coastal's claim for damages based on concealment of information was severed and tried separately, resulting in a federal jury verdict of $20,000,000.00 in Coastal's favor. Judge Stafford also issued an injunction against Mobil's persistent efforts, after he had made certain pivotal rulings, to avoid a federal court determination by initiating state court suits seeking decisions on title to lands claimed by Coastal and

---

[2] If the Peace was navigable at statehood in 1845, then Florida obtained title to the river bed under the "equal footing" doctrine. Under Florida law, lands so obtained are "sovereignty lands" which could not have been conveyed to Mobil. On the other hand, if the Peace was not navigable in 1845, Florida obtained title to the land in 1850 under the Swamp and Overflow Lands Grant Act, 9 Stat. 520, codified at 43 U.S.C. § 982, and Mobil argues the Trustees then later conveyed good title to Mobil. *See* 671 F.2d at 423, App. at 12a.

Mobil. One of those state court suits involved the same parcel of land involved in the federal suit and the state suit would have relitigated certain issues already determined in the federal suit. Judge Stafford accordingly enjoined Mobil's effort to interfere with the federal litigation by relitigating identical issues in state court.

Mobil filed separate appeals to the Eleventh Circuit from the judgment on the jury verdict for $20 million and the injunction issued by Judge Stafford. Both appeals raised a common legal issue—whether the District Court had jurisdiction over the case. The Court of Appeals consolidated the two appeals and, in an opinion by Judge Tjoflat, held that there was no federal jurisdiction. 671 F.2d at 426, App. at 18a. Although that court recognized that the determination of navigability would "resolve the controversy," and was properly pled as a necessary element of Mobil's claim, it nonetheless held that the case was not one that arose under federal law. Relying primarily on the dissent in *Smith, supra,* the Court of Appeals reasoned that Mobil's rights, if any, were entirely the concern of state law. The Court of Appeals did not accept Mobil's argument that federal jurisdiction was absent because the navigability issue should be decided under state law. Instead, the Court of Appeals agreed with Coastal's argument that the navigability of the Peace was to be determined using federal law concepts. *See, e.g., United States* v. *Oregon,* 295 U.S. 1, 14 (1935), *United States* v. *Holt State Bank,* 270 U.S. 49 (1926), *Oregon* v. *Riverfront Protection Ass'n.,* 672 F2d 792, 794 (9th Cir. 1982). Nonetheless the Court of Appeals held there was no federal jurisdiction because "the federal question relied upon by [Coastal] is a mere criterion which Florida chooses to adopt as the determinant of a rule of state real property law," 671 F.2d at 424, App. at 13a. The Court of Appeals vacated the $20 million judgment and dissolved the injunction.

Coastal and the Trustees both sought stays from this Court. Those applications were denied by Mr. Justice Powell and by the full Court. Nos. A-897, A-913, 102 S.Ct. 2029 (May 3, 1982).

REASONS FOR GRANTING THE WRIT

I. The Court of Appeals has Rendered a Decision Inconsistent with the Controlling Decision of this Court

Although this case is controlled by this Court's decision in *Smith, supra,* the Court of Appeals followed the dissent in that case rather than the majority. *Smith* has never been overruled. Indeed the rationale of that decision has been consistently followed by this Court, most recently in *Duke Power Co.* v. *Carolina Environ. Study,* 438 U.S. 59 (1978).

In *Smith* a shareholder sued a Kansas City trust company to enjoin it from investing in farm loan bonds issued under the authority of the Federal Farm Loan Act of 1916, 39 Stat. 360. The complaint alleged that while the trust company was authorized to invest in government bonds, it could not invest in bonds that were not issued under a valid law and the Farm Loan Act was alleged to be unconstitutional and beyond the power of Congress to enact.

This Court first examined the jurisdictional issue to decide "whether the cause of action set forth arises under the Constitution or laws of the United States." *Smith, supra,* at 199. The Court stated the principle:

> "The general rule is that, where it appears from the bill or statement of the plaintiff that the right to relief depends upon the construction or application of the Constitution or laws of the United States, and that such federal claim is not merely colorable and rests upon a reasonable foundation, the District Court has jurisdiction under [the Federal question] provision." *Id.*

Writing for the Court, Mr. Justice Day then quoted Chief Justice Marshall's statement of the rule:

> "A case in law or equity consists of the right of the one party, as well as of the other, and may truly be said to arise under the constitution or a law of the United States, *whenever its correct decision depends upon the construction of either," Cohens* v. *Virginia,* 6

> Wheat. 264, 379 (5 L. Ed. 257); and again, when "the title or right set up by the party, may be defeated by one construction of the Constitution or law of the United States, and sustained by the opposite construction." *Osborn* v. *Bank of the United States*, 9 Wheat. 738, 822 (6 L. Ed. 204); quoted in *Smith, supra*, at 199. (emphasis added).

The Court then cited nine subsequent Supreme Court decisions in which the principle had been quoted and approved or followed. *Smith, supra*, at 200. The Court went on to analyze the principle as it applied to the facts in that case. It was noted that the trust company directors contended the federal law was constitutional, while the plaintiff claimed it was not. It was noted "that the controversy concerns the constitutional validity of an act of Congress which is directly drawn in question. The decision depends upon the determination of this issue." *Smith, supra*, at 201. Finally the Court concluded "that the District Court had jurisdiction under the averments of the bill. . . ." *Id.*, at 202.

Mr. Justice Holmes dissented on the basis of his conclusion that jurisdiction was absent. Because the Court of Appeals in this case adopted the Holmes' dissent, it will be quoted at length to show how precisely similar are the relevant facts in this case and the *Smith* case:

> "It is evident that the cause of action arises not under any law of the United States but wholly under Missouri law. The defendant is a Missouri corporation and the right claimed is that of a stockholder to prevent the directors from doing an act, that is, making an investment, alleged to be contrary to their duty. But the scope of their duty depends upon the charter of their corporation and other laws of Missouri. If those laws had authorized the investment in terms the plaintiff would have had no case, and this seems to me to make manifest what I am unable to deem even debatable, that, as I have said, the cause of action arises wholly under Missouri law. If the Missouri law authorizes or forbids the investment

> according to the determination of this Court upon a point under the Constitution of Acts of Congress, still that point is material only because the Missouri law saw fit to make it so. The whole foundation of the duty is Missouri law, which at its sole will incorporated the other law as it might incorporate a document. The other law or document depends for its relevance and effect not on its own force but upon the law that took it up, so I repeat once more the cause of action arises wholly from the law of the State.
>
> But it seems to me that a suit cannot be said to arise under any other law than that which creates the cause of action.... The mere adoption by a State law of a United States law as a criterion or test, when the law of the United States has no force proprio vigore, does not cause a case under the State law to be also a case under the law of the United States, and so it has been decided by this court again and again."

Smith, supra, at 214-15 (dissenting opinion). This dissenting view has never been adopted by a majority of this Court and the Court's decision in *Smith* decision remains valid today. In 1946 Mr. Justice Black, writing for the Court, said:

> "[T]he right of the petitioners to recover under their complaint will be sustained if the Constitution and laws of the United States are given one construction and will be defeated if they are given another. For this reason the district court has jurisdiction." *Bell* v. *Hood,* 327 U.S. 678, 685 (1946).

Eleven years later Mr. Justice Frankfurter had occasion to comment on the issue:

> "[D]ecisions under the general statutory grants have tested jurisdiction in terms of the presence, as an integral part of the plaintiff's cause of action, of an issue calling for interpretation or application of federal law.... Although it has sometimes been suggested that the 'cause of action' must derive from

> federal law . . . it has been found sufficient that some aspect of federal law is essential to plaintiff's success. *Smith* v. *Kansas City Title & Trust Co. . . .*" *Textile Workers Union* v. *Lincoln Mills,* 353 U.S. 448, 470 (1957) (dissenting on an unrelated issued).

In 1963 Mr. Justice Brennan, joined by Chief Justice Warren and Mr. Justice Black, discussed the vitality of *Smith*:

> "It has been suggested that later decisions . . . repudiated Smith. . . . But those decisions are clearly distinguishable. . . . Smith remains firm authority for the principle that 'where federal law has inserted itself into the texture of state law, a claim founded on the national legislation could be brought into a federal forum even if the ritht of action was state-created." *Wheeldin* v. *Wheeler,* 373 U.S. 647, 659 (1963) (citations omitted, dissenting on another issue).

Just four years ago this Court again drew on *Smith* in sustaining jurisdiction based on § 1331 in *Duke Power Co.* v. *Carolina Environ. Study,* 438 U.S. 59, 70 (1978).

The Court of Appeals did not explain why it felt free to rely on the *Smith* dissent. The rationale of the Court of Appeals' decision was not argued below. Mobil argued that the issue of navigability was to be determined under state law and hence federal jurisdiction was lacking. Mobil did not suggest that Federal jurisdiction was lacking if the navigability issue was to be decided under Federal law. Indeed such a suggestion would have appeared foolhardly in light of *Smith.* The Court of Appeals did not accept Mobil's argument, concluded the navigability issue was controlled by Federal law, yet went on to—in effect—overrule the *Smith* majority and rely on the dissent. Because that reliance is unexplained (and indeed inexplicable) and in light of the continuing validity of the majority opinion in *Smith,* we submit that certiorari should be granted and the judgment of the Court of Appeals summarily reversed.

We recognize that summary reversal is an infrequent practice, but it is appropriate in cases of clear error like this one. It is particularly appropriate here where the same error in a Fifth Circuit decision has been previously reviewed and reversed by this Court. In *International Association of Machinists* v. *Central Airlines*, 372 U.S. 682 (1963), the Fifth Circuit had held that a suit to enforce an award under the Railway Labor Act did not arise under Federal law because the suit was "nothing more than a state-created action to construe a contract." 295 F.2d. 209, at 220. There—as here—the Court of Appeals had relied on *Smith*. In that case this Court reversed the decision below; it should do so here as well.

II. Certiorari Should be Granted to Decide an Important Issue on Which There is a Conflict in the Circuits

Courts and commentators have noted that the federal question doctrine is one which has not been resolved with complete clarity. The confusion is illustrated by the fact that the Court of Appeals in this case held there was no federal jurisdiction, despite the seemingly clear lesson of *Smith* and its more recent progeny. Proper resolution of this issue is important to the administration of justice in the federal courts. If the Court of Appeals is not summarily reversed the decision below will create additional confusion in the precedents over this issue—a confusion which this Court should try to dispel.

This case presents the Court with an excellent vehicle to clarify "[t]he most difficult single problem in determining whether federal jurisdiction exists . . . when the relation of federal law to a case is such that the action may be said to be one 'arising under' that law." 13 *Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction*, § 3562, Supp. at 339 (1980). The "last comprehensive discussion by the Supreme Court" of this basic principle occurred in 1936 in *Gully* v. *First National Bank*, 299 U.S. 109. *Wright, Miller & Cooper, supra*, main volume at 405. The lower federal courts continue to struggle with the *Gully* decision in its application to other cases. "Although the Supreme Court has rendered several relevant decisions, these cases do not fit snugly into a single, logical mossaic." *Keaukaha-Panaewa Com.* v. *Hawaiian Homes*

Com'n., 588 F.2d 1216 (9th Cir. 1978). The uncertain state of the law in this area is illustrated by the fact that in this case the lower courts were divided on the issue and the Court of Appeals relied primarily on a dissenting opinion from this Court. If this Court is not prepared to summarily re-affirm *Smith* and reverse the decision below, this case should be set for full briefing and argument.

The uncertainty and conflict in the law is illustrated by the recent decision of the Fourth Circuit in *City National Bank* v. *Edmisten*, 681 F.2d 942 (1982). In that case five national banks sought a declaratory judgment that a proposed credit card annual membership fee would not violate state usury laws, alleging that the case arose under 12 U.S.C. §§ 85 and 86 which regulate the interest which may be charged by national banks. The Court of Appeals held there was no jurisdiction, but noted:

> "[A] state-created cause of action may also arise under federal law if the resolution of the dispute depends upon the validity, construction or effect of federal law, so long as the federal question is a real and substantial issue, *Shulthis* v. *McDougal*, 225 U.S. 561, 569 (1912), and its resolution is an essential element of plaintiff's case. *Gully* v. *First National Bank*, 299 U.S. 109, 112 (1936)." *City National Bank, supra*, at 945.

That statement of the law clearly conflicts with the decision of the Eleventh Circuit in this case. The conflict should be resolved by this Court before it creates further confusion. The decision below is perhaps too recent to have been noticed by other courts, and it was not referred to in the *City National Bank* case. However, it can be expected that other courts may well cite and follow the decision below if certiorari is denied.

The procedural complications in this case graphically demonstrate why this Court should review this case to minimize any possibility that other courts will follow the Eleventh Circuit. Relying on seemingly well-established principles Coastal and the Trustees removed this case to the district court. That court, again relying on seemingly well-established principles, upheld

its own jurisdiction and proceeded to try the case. Exhaustive discovery was undertaken. Hundreds of thousands of documents were reviewed. More than 20,000 pages of testimony were taken in discovery and at trial. Six years of time involving multiple lawyers for each party were consumed. The total claims involved in the litigation exceed $1,400,000,000. Despite the massive investments of judicial, legal and economic resources, the proceeding—according to the Eleventh Circuit—has been flawed from the beginning and now must start anew in state court. This wasted effort has resulted from a single appellate decision which may reflect an unwarranted concern over limiting federal jurisdiction to alleviate growing caseloads. It does not contribute to efficient allocation of resources for courts to strike without warning, go against 60 years of established doctrine, and set aside the cumulative work of thousands of hours because of a concern to divert litigation from federal courts. Such a concern would be especially misplaced here. There is an important federal interest in the resolution of this suit. If the Peace River was navigable at statehood, the United States retains a navigation servitude that is paramount to the interests of Coastal or Mobil. *See Coastal Petroleum* v. *United States*, 524 F.2d 1206 (Ct. Cl. 1975). The adjudication of this Federal interest should not be left to the state courts. This case is the type of controversy which should be resolved in the comparatively more detached federal forum.

This appeal arises out of one of more than ten related cases pending in the federal and state courts in Florida.[3] These cases

[3] The federal cases are: *Coastal, et al.* v. *International Minerals and Chemical Corporation*, Case No. TCA 77-0946; *Coastal, et al.* v. *U.S.S. Agri-Chemicals*, Case No. TCA 77-0971; *Coastal, et al.* v. *Swift Agricultural Chemicals Corporation*, Case No. TCA 77-0972; *Coastal et al.* v. *Agrico Chemical Company*, Case No. TCA 77-0973; *Coastal, et al.* v. *W.R. Grace & Company*, Case No. TCA 77-0974, *Coastal, et al.* v. *American Cyanamid Company*, Case No. TCA 77-0975; *Coastal* v. *Mobil*, Case No. TCA 82-0787; *Coastal* v. *Mobil, et al.*, Case No. TCA 79-0730, all pending in the Northern District of Florida. The state cases, in which proceedings were enjoined by the federal court are: *Mobil Oil Corporation* v. *Coastal Petroleum Company,*

(footnote continued)

involve large claims against virtually the entire Florida phosphate industry, an industry second only to tourism in importance to the Florida economy. Thus, it is particularly important that this case be tried in the most neutral forum possible where the interests of the State, the private parties and the Federal Government can all be protected. That forum is the federal court.

(footnote continues)

Case No. GC-G-81-2198; *United States Steel Corporation* v. *Coastal Petroleum Company*, Case No. GCG-81-2443; *International Minerals & Chemical* v. *Coastal Petroleum Company*, Case No. GCG-81-2480; *American Cyanamid Company* v. *State of Florida, Department of Natural Resources*, Case No. GCG-80-290.

CONCLUSION

For the reasons set forth, this Court should grant the petition for a writ of certiorari and summarily reverse the decision of the Court of Appeals on the authority of the *Smith* decision. Alternatively the case should be set for argument to decide the important Federal question presented and resolve the conflict in the law on federal jurisdiction under § 1331 evidenced by this decision and the decision of the Fourth Circuit in *City National Bank.*

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FOR THE
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

TCA 79-1082

MOBIL OIL CORP., a New York Corporation,
Plaintiff,

v.

COASTAL PETROLEUM COMPANY, a Florida corporation,

and

THE BOARD OF TRUSTEES OF THE INTERNAL IMPROVEMENT TRUST FUND OF THE STATE OF FLORIDA,
Defendants.

ORDER

This case is before the court for consideration of Mobil Oil Corporation's motion to remand (Document 6). Following the submission of extensive memoranda by all parties to this litigation, the court heard oral argument on the motion on March 10, 1980 (Documents 6, 10, 11, 14, 24, 25, 27 and 30).

Mobil urges remand to the state court from which this case was removed on the basis of (1) absence in this court of "original jurisdiction founded on a claim or right arising under the Constitution, treaties, or laws of the United States", *i.e.*, the absence of federal question jurisidiction had the suit been instituted herein, and (2) the alleged impropriety of removal by the Board of Trustees of the Internal Improvement Trust Fund of the State of Florida because the Board of Trustees is

not a defendant under 28 USC § 1441 and because the Board of Trustees "voluntarily" submitted to the jursdiction of the state court.

The history of this action is well-known to the parties and need not be reiterated here, except to note that the Board's petition for removal followed Mobil's filing on November 28, 1979 of a "counterclaim" in response to Coastal's second counterclaim in the state action and joinder of the Trustees in its counterclaim. Mobil seeks declaratory judgment with respect to lands assertedly owned by Mobil in the area in issue under Coastal's second counterclaim, which charges Mobil conducted phosphate mining operations upon sovereignty lands owned by the Board and subject to a mineral lease to Coastal. These sovereignty lands are alleged to lay naturally beneath navigable waterbodies which traverse Mobil's mining properties. Mobil seeks a declaration of its rights of ownership and a declaration that the sovereignty claim of Coastal and the Trustees is invalid because the waterbodies upon which the claim is premised were not navigable at the date of statehood under federal law.

The navigability of the waterbodies in issue in 1845 and the location of the ordinary high water line of the waterbodies in 1845, if they were navigable, are issues to be determined by federal law. *Oregan ex rel State Land Board* v. *Corvallis Sand & Gravel Co.*, 429 U.S. 363 (1977) at 370, 376; *United States* v. *Oregon*, 295 U.S. 1,14 (1934); *United States* v. *Utah*, 283 U.S. 64, 75 (1931). *See also Illinois* v. *City of Milwaukee*, 406 U.S. 91, 99 (1972). Additionally, in this case the determination of these federal questions is a condition precedent to a declaration of Mobil's rights of ownership with respect to the lands which it claims through various deeds and patents. Mobil correctly states that a determination of whether the property in question was transferred into private ownership is a State question, which must be determined in accordance with State law, necessarily involving the State test of navigability. *Corvallis, supra*, at 377-8. However, Mobil ignores the essential and initial necessity for a determination of the federal question raised by its declaratory action before the State questions may even be reached. Thus, the federal questions involved are an

essential element of Mobil's claim; Mobil's rights may be defeated or supported if federal law is given one construction or effect; there is a genuine controversy with respect to the federal questions involved; and the non-navigability of waterbodies at statehood which is alleged in Mobil's declaratory "counterclaim" is not simply anticipation of Coastal and the Trustees' probable defense, as Mobil has argued in its motion to remand, but is an essential element of Mobil's cause of action. *Gully* v. *First National Bank in Meridian*, 299 U.S. 109 (1936); *May* v. *Holley*, 59 So. 2d 636, 639 (1952).

Mobil's "counterclaim" can thus be seen to have brought this action within the original jurisdiction of this Court as an action "arising under" federal law. Mobil's declaratory claim seeks fundamentally to resolve whether the sovereignty claim of the Trustees and Coastal, upon which the conversion claim is based, is valid. A determination of the validity of the sovereignty claim depends on the navigability of the rivers in issue at statehood, a federal question.

A reciprocal request for declaratory relief such as Mobil's purported "counterclaim" is necessarily a permissive counterclaim. In substance this particular reply "counterclaim" is an amendment to plaintiff's complaint. 3 *Moore's Federal Practice* ¶13.08; *Vines* v. *Emerald Equipment Co.*, 342 So. 2d 137, 138 (Fla. 1st DCA 1977). Mobil is plaintiff and Coastal and Trustees are defendants with respect to the declaratory claim and recasting of the parties is inappropriate. *Shamrock Oil and Gas Corp.* v. *Sheets*, 313 U.S. 100, 104, 107, 108 (1941). *See also Cliett* v. *Scott*, 283 F.2d 269, 271 (5th Cir. 1956).

The essential concern is determining the right to remove is consideration of which party selected the original forum, with removal being limited to parties who made no such choice. *Victorias Milling Co., Inc.* v. *Hugo Neu Corporation*, 196 F. Supp. 64, 68 (S.D.N.Y. 1961). Both Coastal and the Trustees are defendants entitled to removal with respect to Mobil's declaratory action and the court finds no waiver of that right by the Trustees' actions prior to the filing of Mobil's reply "count-

erclaim" for declaratory judgment in the state court action. *Cliett* v. *Scott, supra* at 269, 271; *Paris* v. *Affleck*, 431 F. Supp. 878, 880 (M.D. Fla. 1977); *Wright* v. *Lupton*, 118 F. Supp. 25 (W.D. Mo. 1954).

In accordance with the foregoing, it is ORDERED AND ADJUDGED that Mobil Oil Corporation's motion to remand (Document 6) should be, and hereby is, DENIED.

DONE AND ORDERED this 3rd day of June, 1980.

WILLIAM STAFFORD
UNITED STATES DISTRICT JUDGE

MOBIL OIL CORPORATION, a New York Corporation,
Plaintiff-Appellant,

v.

COASTAL PETROLEUM COMPANY, a Florida Corporation,
Defendant-Appellee.

MOBIL OIL CORPORATION, a New York Corporation,
Plaintiff-Appellant,

v.

COASTAL PETROLEUM COMPANY,
a Florida Corporation, and The
State of Florida Department of
Natural Resources and The Board
of Trustees of the Internal Improvement
Trust Fund of the State of Florida,
Defendants-Appellees.

Nos. 81-5533, 81-5812.

United States Court of Appeals,
Eleventh Circuit.

March 4, 1982.

Vacated with instructions.

Appeals from the United States District Court for the Northern District of Florida.

Before MORGAN, TJOFLAT and JOHNSON, Circuit Judges.

TJOFLAT, Circuit Judge:

I.

These consolidated appeals arise out of a lawsuit whose complex procedural history we need only summarize. On September 24, 1976, Mobil Oil Corporation (Mobil) filed a complaint in the Circuit Court for Leon County, Florida, seeking a declaration of its rights under an oil exploration agreement with Coastal Petroleum Company (Coastal). Coastal responded with five counterclaims, the second of which alleged Mobil's conversion of phosphate from lands owned by the State of Florida and leased by Coastal. Coastal joined as a necessary party to the second counterclaim the Trustees of the Internal Improvement Trust Fund of the State of Florida (the Trustees), who hold title to state lands.

On November 20, 1979, Mobil filed a counterclaim (the reply counterclaim) against Coastal and the Trustees, seeking a declaration of the parties' rights based on an 1862 deed from the Trustees to Mobil's predecessor in interest encompassing eighty acres of unmined land coursed by the Peace River. On December 20, 1979, the Trustees and Coastal (appellees) removed the case to the district court, asserting that Mobil's reply counterclaim raised a substantial federal question by challenging the Trustees' sovereignty claim to the subject land. Mobil moved to remand the case to the state court, but the district court denied the motion.

In December of 1980, Coastal's fourth counterclaim was tried in the district court, resulting in a final judgment on a jury verdict in favor of Coastal. In No. 81-5533, Mobil appeals that judgment, contending that the district court lacked subject matter jurisdiction of the reply counterclaim, and therefore of the case, and that the district court committed error in the conduct of the trial.[1]

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[1] In addition to its jurisdictional contention, Mobil argues that the record contains no evidence to support the jury's assessment of compensatory damages and that the district court erred in ruling that the Mobil-Coastal oil

(footnote continued)

On July 29, 1981, Coastal moved the district court for an injunction to prohibit Mobil from proceeding further in a related state court quiet title action. The district court entered an order enjoining the parties from filing or further litigating in any state or federal court any lawsuit which would require the determination of any legal or factual issue forming the basis of this lawsuit or necessarily relating thereto. In No. 81-5812, Mobil appeals the injunction, contending that it is prohibited by the Anti-Injunction Act, 28 U.S.C. § 2283 (1976), and, again, challenging the subject matter jurisdiction of the district court. Because we conclude that the district court lacks jurisdiction of this case, we reach none of the other issues raised in these consolidated appeals.

II.

The federal removal statute, 28 U.S.C. § 1441 (1976), permits defendants to remove state court civil actions of which the federal courts have original jurisdiction.[2] The jurisdictional

---

(footnote continues)

exploration agreement required Mobil to furnish a geochemical report to Coastal; in instructing the jury that it could award more than nominal damages under Count One of Coastal's fourth counterclaim; in submitting a misrepresentation claim to the jury; and in submitting Coastal's request for punitive damages to the jury.

[2] 28 U.S.C. § 1441 (1976) provides in pertinent part:

> (a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.
>
> (b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

question presented in this case is whether Mobil's reply counterclaim arises under federal law within the meaning of 28 U.S.C.A. § 1331(a) (West Supp. 1980)[3] so as to be removable.[4] The reply counterclaim alleges in relevant part:

> **ALLEGATIONS COMMON TO ALL COUNTS**
>
> 1. This is an action for declaratory judgment pursuant to Chapter 86, Florida Statutes. The subject matter of the controversy exceeds $2,500 in value.
>
> 2. MOBIL owns, and is in possession of the SE ¼ of NW ¼ and SW ¼ of NE ¼ of Section 23, Township 31 South, Range 25 East, Polk County, Florida. The Peace River courses a part of these lands and parts lie within the swamps that adjoin the river.
>
> 3. MOBIL's ownership is based on a continuous chain of title which began with a deed from the State of Florida to Henry S. Seward dated November 20, 1862. The deed . . . does not mention any rivers, waterbodies or watercourses nor does it reserve any interest in STATE.
>
> 4. STATE and COASTAL have asserted in this suit that MOBIL has converted phosphate by having mined certain lands allegedly owned by STATE and that are subject to a mineral lease between STATE and COASTAL . . . . The lands described in para-

[3] 28 U.S.C.A. § 1331(a) (West Supp. 1980) provides: The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

[4] No other claim in the case is asserted to arise under federal law. The Trustees correctly concede that the action could not be removed on diversity grounds because, assuming *arguendo* that the Trustees are a citizen for purposes of diversity, removal on diversity grounds is permitted only if no defendant is a resident of the state where the action was brought. See 28 U.S.C. § 1441(b), *supra*, note 2. Coastal's argument that Mobil waived the right to challenge removal of diversity grounds is meritless.

graph 2, above, have not been mined and, accordingly, are not among the lands from which phosphate has allegedly been converted.

5. The conversion claims of STATE and COASTAL are bottomed on the contention that the lands from which the phosphate was allegedly taken underlie waterbodies or watercourses which were navigable in fact when Florida became a State on March 3, 1845, and, as such, are sovereignty lands.

* * *

COUNT 1

(Lands are not sovereignty in character)

10. The Peace River was not "meandered" (which would have indicated navigability) nor otherwise designated as navigable, by the original government surveyors or those who prepared the original township plats at any point north of the dividing line between Townships 38 and 39.

11. The Peace River was not navigable in fact on March 3, 1845, at any point north of the dividing line between Townships 38 and 39. Township 31 is north of that line.

12. Inasmuch as there were no navigable waterbodies on the lands described in paragraph 2, above, on March 3, 1845, no part of the lands are sovereignty lands.

The eight remaining counts of the reply counterclaim involve, all parties agree, only state law questions.

[1-3] For a case to arise under federal law a right or immunity created by that law must be an essential element of the plaintiff's claim; the federal right or immunity that forms the basis of the claim must be such that the claim will be supported if the federal law is given one construction or effect and defeated if it is given another. *Maxwell v. First Nat'l Bank*

of Monroeville, 638 F.2d 32, 35 (5th Cir. 1981)[5]; *In Re Carter*, 618 F.2d 1093, 1100 (5th Cir. 1980), *citing Gully v. First Nat'l Bank in Meridian*, 299 U.S. 109, 112, 57 S.Ct. 96, 97, 81 L.Ed. 70 (1936). In order to determine whether the claim arises under the Constitution or laws of the United States, we look to the complaint unaided by anticipated defenses and with due regard to the real nature of the claim. *Maxwell*, 638 F.2d at 35; *Gully*, 299 U.S. at 113, 57 S.Ct. at 98. "A suit to enforce a right which takes its origin in the laws of the United States is not necessarily, or for that reason alone, one arising under those laws, for a suit does not so arise unless it really and substantially involves a dispute or controversy respecting the validity, construction or effect of such a law, upon the determination of which the result depends. This is especially so of a suit involving rights to land acquired under a law of the United States." *Heirs of Burat v. Bd. of Levee Comm'rs*, 496 F.2d 1336, 1342 (5th Cir.), *cert. denied*, 419 U.S. 1049, 95 S.Ct. 625, 42 L.Ed.2d 644 (1974), *quoting Shulthis v. McDougal*, 225 U.S. 561, 569, 32 S.Ct. 704, 706, 56 L.Ed. 1205 (1912).

[4, 5] Acknowledging these precepts, the parties differently characterize Mobil's pleading. Pointing to the reply counterclaim's challenge to Florida's acquisition of title to the disputed lands as sovereignty lands, the Trustees and Coastal argue that Mobil's claim turns on a federal question, namely, the navigability of the Peace River on March 3, 1845, the date Florida was admitted to the Union. If the Peace River was navigable at that date, title to the lands beneath the river passed from the United States to the State of Florida under the equal footing doctrine[6] and were received by Florida as

[5] The Eleventh Circuit has adopted as binding precedent decisions rendered by the former Court of Appeals for the Fifth Circuit before the close of business on September 30, 1981. *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981) (en banc).

[6] Under the equal footing doctrine, "the new States . . . have the same rights, sovereignty and jurisdiction . . . as the original States possess within their respective borders." *Mumford v. Wardwell*, 6 Wall. 423, 436, 18 L.Ed. 756 (1867). *Pollard's Lessee v. Hagan*, 3 How. 212, 11 L.Ed. 565 (1845), held that under the equal footing doctrine, new states, upon their administration to the Union, acquire title to the lands underlying navigable waters within their boundaries.

sovereign lands. The passing of title under the equal footing doctrine, the argument continues, is a federally created right which is governed by federal law; thus, the navigability of the Peace River on March 3, 1845, is a substantial federal question supporting federal subject matter jurisdiction.

Mobil maintains that its reply counterclaim involves a mere title dispute between Florida land claimants, each of whom derives its claim from the State, so that Florida law, and not federal law, governs the controversy. While federal law may determine the navigability of waters for the limited purpose of ascertaining ehether title to a riverbed passed from the United States to Florida when Florida became a state, once title has passed, as the parties agree has occurred here, Florida law governs any subsequent claim to the property.

In its denial of Mobil's motion to remand, the district court embraced the characterization advanced by the Trustees and Coastal:

> The navigability of the waterbodies in issue in 1845 and the location of the ordinary high water line of the waterbodies in 1845, if they were navigable, are issues to be determined by federal law. Additionally, in this case the determination of these federal question is a condition precedent to a declaration of Mobil's rights of ownership with respect to the lands which it claims through various deeds and patents. Mobil correctly states that a determination of whether the property in question was transferred into private ownership is a state question, which must be determined in accordance with State law, necessarily involving the State test of navigability. However, Mobil ignores the essential and initial necessity for a determination of the federal questions raised by its declaratory action before the State questions may even be reached. . . .
>
> Mobil's "counterclaim" can thus be seen to have brought this action within the original jurisdiction of this Court as an action "arising under" federal law. Mobil's declaratory claim seeks fundamentally to resolve whether the sovereignty claim of the Trustees and Coastal, upon which the conversion claim is

based, is valid. A determination of the validity of the sovereignty claim depends on the navigability of the rivers in issue at statehood, a federal question.

(citations omitted).

[6] Clearly enough, Mobil does allege that the Peace River was not navigable in fact on March 3, 1845, and that the disputed property is therefore not sovereignty land. The appellees cite *United States v. Oregon*, 295 U.S. 1, 55 S.Ct. 610, 79 L.Ed. 1267 (1935), and *United States v. Utah*, 283 U.S. 64, 51 S.Ct. 438, 75 L.Ed. 844 (1931), for the proposition that the question whether a river is navigable so that the submerged lands pass to a state at statehood is a federal question supporting federal jurisdiction. Those cases were property contests between the United States and a state. We do not question that when the United States and a state dispute whether submerged land has passed to a state under the equal footing doctrine or remains federal land, navigability is a federal question. In order to ascertain whether Mobil's claim, with due regard to its real nature, presents a substantial controversy respecting the validity, construction, or effect of federal law, however, we must identify the role which the asserted federal question plays in the present controversy.

The disputed property was deeded by the State of Florida to Mobil's predecessor in interest in 1862, and the state held title to the property at the time of the conveyance. Title had passed to the state by one of two means: either Florida acquired the lands under the equal footing doctrine at statehood on March 3, 1845, because the Peace River was then navigable, or Florida acquired the lands in 1850 under the Swamp and Overflow Lands Grant Act, 9 Stat. 520, now codified at 43 U.S.C. § 982 (1976). If the state acquired the lands under the equal footing doctrine in 1845, they were received as sovereignty lands; otherwise, they were not. Florida law treats sovereignty lands differently than other lands: sovereignty lands, unlike other lands, are held by the state in public trust and are subject to certain restrictions on alienation.

The position of the Trustees and Coastal is that the Peace River was navigable on March 3, 1845, so that the state

received the disputed lands as sovereignty lands and the 1862 deed did not, under Florida law, convey the property to Mobil's predecessor in interest. Mobil's position is that the Peace River was not navigable on March 3, 1845, so that the state received the disputed lands in 1850 as nonsovereignty lands, and the 1862 deed, under Florida law, conveyed the property to Mobil's predecessor in interest.

[7] The sole significance in this case of the navigability of the Peace River in 1845 is that the State of Florida elects to denominate lands acquired from the United States under the equal footing doctrine as sovereign lands and to restrict the alienability of those lands. The federal question relied on by the appellees is a mere criterion which Florida chooses to adopt as the determinant of a rule of state real property law. In 1862, before the state deeded the disputed property to Mobil's predecessor in interest, the state was at absolute liberty, so far as federal law was concerned, to treat the property as it wished. If the property was subject to restrictions on alienation, those restrictions were imposed by state law. That the state chose to look to the equal footing origin of the lands as fixing forever their sovereign character is no predicate for federal jurisdiction.

Properly viewed, then, the question which is asserted to support the jurisdiction of the district court is incidental to Mobil's claim and not at its essence; nor does the fact that a determination of navigability may resolve the controversy alter our conclusion.

> The whole foundation of the duty is [state] law, which at its sole will incorporated the other law as it might incorporate a document. The other law or document depends for its relevance and effect not on its own force but upon the law that took it up, so . . . the cause of action arises wholly from the law of the State. . . . The mere adoption by a State law of a United States law as a criterion or test, when the law of the United States has no force proprio vigore, does not cause a case under the State law to be also a case under the law of the United States. . . .

Smith v. Kansas City Title & Trust Co., 255 U.S. 180, 214-15, 41 S.Ct. 243, 250, 65 L.Ed. 577 (1921) (Holmes, J., dissenting).

The decision of the Supreme Court in *Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 97 S.Ct. 582, 50 L.Ed.2d 550 (1977), strongly supports our holding. There, the State of Oregon had brought a state court ejectment action against an Oregon corporation over the ownership of two portions of land underlying the navigable Willamette River. One portion had been within the riverbed since Oregon's admission to the Union, while the other had only later become part of the riverbed because of changes in the river's course. The Oregon courts took the view that federal common law controlled the dispute because the extent of a state's sovereign right under the equal footing doctrine was a federal question. On this basis, they awarded the first portion to the state and the second to the corporation.

On certiorari, the Supreme Court vacated the judgment and remanded, holding that ownership of the disputed lands should be decided solely as a matter of Oregon law and not federal common law, because application of federal common law was required neither by the equal footing doctrine nor by any other principle of federal law. So holding, the Court overruled *Bonelli Cattle Co. v. Arizona*, 414 U.S. 313, 94 S.Ct. 517, 38 L.Ed.2d 526 (1973), and repudiated *Bonelli's* holding that the nature of the title conferred by the equal footing doctrine is governed by federal common law. 429 U.S. at 369-70, 97 S.Ct. at 586-587. "Although federal law may fix the initial boundary line between fast lands and the riverbeds at the time of a State's admission to the Union, the State's title to the riverbed vests absolutely as of the time of its admission and is not subject to later defeasance by operation of any doctrine of federal common law." *Id.* at 370-71, 97 S.Ct. at 587. Most significantly here, the Court reaffirmed that:

> [W]henever the question in any Court, state or federal, is, *whether* a title to land which had once been the property of the United States has passed, that question must be resolved by the laws of the

> United States; but . . . *whenever,* according to those laws, *the title shall have passed,* then that property, like all other property in the state, is *subject to state legislation;* so far as that legislation is consistent with the admission that the title passed and vested according to the laws of the United States.

Id. at 377, 97 S.Ct. at 590, quoting *Wilcox v. Jackson,* 13 Pet. 498, 517, 10 L.Ed. 264 (1839) (emphasis in original).

The Trustees and Coastal would limit *Corvallis* to title disputes in which the parties agree that the lands previously acquired by the state were acquired as sovereignty lands. The Supreme Court in *Corvallis* foreclosed this interpretation of its decision. The Court held that state law governs the disposition of property held by a state regardless of whether or not the state acquired the property as sovereignty land under the equal footing doctrine:

> Thus, if the lands at issue did pass under the equal-footing doctrine, state title is not subject to defeasance and state law governs subsequent dispositions.
>
> • • • •
>
> A similar result obtains in the case of riparian lands which did not pass under the equal footing doctrine. This Court has consistently held that state law governs issues relating to this property, like other real property, unless some other principle of federal law requires a different result.

429 U.S. at 378, 97 S.Ct. at 591.

The appellees insist that the pivotal issue in this case is indeed, as *Corvallis* requires, "*whether* a title to land which had once been the property of the United States has passed," because the principal controversy is *whether* the Trustees acquired title to the disputed lands in 1845 under the equal footing doctrine, or in 1850 as swamp and overflow lands. But there is no question in this case *whether,* in the sense obviously intended by *Corvallis,* title to the disputed land has passed; the

parties agree that it has. The issue is whether, under Florida law, the 1862 deed to Mobil's predecessor conveyed the disputed property. That Florida chooses to answer this question by inquiring by what means it initially acquired title to the property does not alter the fact that this is a case in which, title having passed to the state, state law controls.

A case bearing more directly on the collateral relationship between the navigability of the Peace River in 1845 and the present controversy is *Miller's Executors v. Swann*, 150 U.S. 132, 14 S.Ct. 52, 37 L.Ed. 1028 (1893). In *Swann*, Congress had granted public lands to the State of Alabama to aid in the construction of railroads. The Act granting the land provided explicit conditions governing any further conveyance by the State. The State conveyed the land to a railroad company, retaining a mortgage whose terms paralleled the conditions imposed by Congress. Upon the bankruptcy of the railroad, the State and a vendee of the railroad both claimed a certain parcel of land, disputing whether the railroad had sufficiently complied with the conditions of the Act of Congress (as incorporated in the mortgage) to give it the power to convey to the third party claimant. The Alabama Supreme Court determined that the conditions had not been met, and that the State was entitled to the land. On appeal to the United States Supreme Court, the Court concluded that it was without jurisdiction to hear the matter for want of a federal question:

> Now, whether [the Supreme Court of Alabama's] was a correct construction or not of the act [conveying the land to the railroad] and the reservation of the mortgage, is a purely local question, and involves nothing of a federal character. The question is not what rights passed to the state under the acts of congress, but what authority the railroad company had under the statute of the state. The construction of such a statute is a matter for the state court, and its determination thereof is binding on this court. The fact that the state statute and the mortgage refer to certain acts of congress as prescribing the rule and measure of the rights granted by the state does not make the determination of such rights a federal

> question. *A state may prescribe the procedure in the federal courts as the rule of practice in its own tribunals: it may authorize the disposal of its own lands in accordance with the provisions for the sale of the public lands of the United States; and in such cases an examination may be necessary of the acts of congress, the rules of the federal courts, and the practices of the land department, and yet the questions for decision would not be of a federal character. The inquiry along federal lines is only incidental to a determination of the local question of what the state has required and prescribed. The matter decided is one of state rule and practice. The facts by which that state rule and practice are determined may be of a federal origin.*

Id. at 136-37, 14 S.Ct. at 54 (emphasis added).

We find nothing in the case law since *Swann* that causes us to question its currency, *see e.g., Moore v. Chesapeake & Ohio Ry. Co.*, 291 U.S. 205, 54 S.Ct. 402, 78 L.Ed. 755 (1934); *Morris v. Danna*, 411 F.Supp. 1300 (D.Minn.1976), *aff'd*, 547 F.2d 436 (8th Cir. 1977), or its obvious applicability to this case.

Our conclusion that the district court has no jurisdiction of this case comports with the fact that there is no federal interest whatever in the resolution of this controversy. Federal law is appropriately indifferent to Florida's invocation or application of a federal test of navigability as a precondition to determining a question of state law. The appellees direct us to *United States v. Holt State Bank*, 270 U.S. 49, 55-56, 46 S.Ct. 197, 199, 70 L.Ed. 465 (1926), in which the Court held that "Navigability, when asserted as the basis of a right arising under the Constitution of the United States, is necessarily a question of federal law to be determined according to the general rule recognized and applied in the federal courts.... To treat the question as turning on the varying local rules would give the Constitution a diversified operation where uniformity was intended." Here, not as in *Holt State Bank*, neither party asserts navigability as the basis of a right arising under the Constitution or laws of the

United States. Moreover, no uniform interpretation of federal law is intended or needed when the federal law exerts no force proprio vigore but is merely set up by the state as a criterion by which to decide a state law question.

III.

We hold, then, that the district court lacks jurisdiction of this case. The judgment appealed in No. 81-5533 is vacated, and on receipt of the mandate the district court shall remand the case to the state court. The injunction appealed in No. 81-5812 is dissolved.*

VACATED, with instructions.

---

* We note that on October 15, 1981, the district court extended the injunction in this case to apply to American Cyanamid Company which is involved in a similar lawsuit against Coastal American Cyanamid Company's appeal of that injunction is now pending before this court in Case No. 81-6061.

IN THE

United States Court of Appeals

FOR THE ELEVENTH CIRCUIT

No. 81-5533

D.C. Docket No. 79-1082

MOBIL OIL CORPORATION, a New York Corporation,
Plaintiff-Appellant,

versus

COASTAL PETROLEUM COMPANY, a Florida Corporation,
Defendant-Appellee.

No. 81-5812

MOBIL OIL CORPORATION, a New York Corporation,
Plaintiff-Appellant,

versus

COASTAL PETROLEUM COMPANY, a Florida Corporation, and The State of Florida Department of Natural Resources and The Board of Trustees of the Internal Improvements Trust Fund of the State of Florida,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Florida

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Before MORGAN, TJOFLAT and JOHNSON, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Florida, and was argued by counsel:

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment is hereby vacated with instructions in appeal no. 81-5533; the injunction appealed in no. 81-5812 is dissolved;

It is further ordered that Appellants pay to Appellees the costs on appeal to be taxed by the Clerk of this Court.

March 4, 1982

Filed Apr 2 1982 Norman E. Zeller Clerk

IN THE

United States Court of Appeals

FOR THE ELEVENTH CIRCUIT

No. 81-5533 and 81-5812

MOBIL OIL CORPORATION, a New York Corporation,
Plaintiff-Appellant,

v.

COASTAL PETROLEUM COMPANY, a Florida Corporation,
Defendant-Appellee.

MOBIL OIL CORPORATION, a New York Corporation,
Plaintiff-Appellant,

v.

COASTAL PETROLEUM COMPANY, a Florida Corporation, and The State of Florida Department of Natural Resources and The Board of Trustees of the Internal Improvement Trust Fund of the State of Florida,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Florida

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ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC
(Opinion March 4, 11 Cir., 1982, ____ F.2d ____).

Before MORGAN, TJOFLAT and JOHNSON, Circuit Judges.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Local Eleventh Circuit Rule 26), the suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ GERALD B. TJOFLAT

United States Circuit Judge

No. 82-378

FILED
NOV 1 1982
ALEXANDER L. STEVAS
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

COASTAL PETROLEUM COMPANY,
Petitioner,

v.

MOBIL OIL CORPORATION,
THE FLORIDA DEPARTMENT OF
NATURAL RESOURCES, and
THE BOARD OF TRUSTEES OF THE FLORIDA IN-
TERNAL IMPROVEMENT TRUST FUND,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION OF RESPONDENT MOBIL OIL CORPORATION

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QUESTIONS PRESENTED

1. Whether the Court of Appeals' holding that Florida law determines the validity of the State's conveyances of lands it allegedly acquired under the equal footing doctrine conflicts with this Court's decision in *Smith v. Kansas City Title & Trust Co.*, 255 U.S. 180 (1921).

2. Whether the Court of Appeals' decision that plaintiff Mobil Oil Corporation's reply counterclaim does not present a question of federal law is consistent with applicable decisions of this Court.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-379

COASTAL PETROLEUM COMPANY,
Petitioner,

v.

MOBIL OIL CORPORATION,
THE FLORIDA DEPARTMENT OF
NATURAL RESOURCES, and
THE BOARD OF TRUSTEES OF THE FLORIDA IN-
TERNAL IMPROVEMENT TRUST FUND,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION OF RESPONDENT MOBIL OIL CORPORATION

The opinions below are reproduced in petitioner's appendix. Respondent accepts petitioner's statements of jurisdiction and of the statute involved. Respondent has restated the questions presented as hereinbefore stated.

STATEMENT OF THE CASE[1]

This action began in 1976 as a Florida state court suit for a declaratory judgment and was litigated for three years in the Florida courts. After Mobil, the original plaintiff, had prevailed on the original claim and two Coastal counterclaims, and all appeals had been perfected,[2] the State of Florida, joined by Coastal, removed the case to federal court in December, 1979, on the basis of a Mobil pleading in reply to a counterclaim.[3]

By its removal petition, the State asserted that Mobil's new pleading raised a substantial federal question by challenging the State's sovereignty claim, under the equal footing doctrine, to the lands in question.[4]

The district judge denied Mobil's motion to remand, ruling that "determination of the validity of the sovereignty claim depends on the navigability of the rivers in issue at statehood, a federal question," despite the circumstance

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[1]Petitioner's statement of the case does not fairly describe the lengthy and expensive proceedings in the Florida courts prior to removal.

[2]*Coastal Petroleum Company v. Mobil Oil Corp.*, 378 So.2d 336 (Fla. 1st DCA), *cert. denied*, 386 So.2d 635 (Fla. 1980).

[3]The record below demonstrates that Mobil's "reply counterclaim," upon which removal was based, was responsive to Coastal's attempt to change forums after its initial defeat in state court. Mobil stated in its initial brief in the Court of Appeals: "Expressing concern that any transfer of the second (phosphate conversion) counterclaim would entail loss of three years of judicial and litigant labor in state court, Mobil argued that its reply counterclaim would, under Florida state procedures, require retention of the second counterclaim in the original forum."

[4]Ironically, the State of Florida successfully *contested* the application of federal law to a nearly identical phosphate-mining dispute before the turn of the century, avoiding a loss on the merits of a navigability question. *State of Florida v. Charlotte Harbor Phosphate Co.*, 74 F. 578 (5th Cir. 1896).

that the question was presented in a purely intrastate land title dispute not involving any federal interest.[5]

Adhering to this Court's decision in *Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363 (1977), the Court of Appeals reversed, holding that "there is no federal interest whatever in the resolution of this controversy" and that "this is a case in which, title having passed to the state, state law controls."

On May 6, 1982, after receipt of the Court of Appeals' mandate, the district judge entered an order remanding the case to the state court from which it was removed. The case is now proceeding in the state court as before removal.

The State of Florida, the removing party, has not sought review in this Court.[6] The sole petitioner is Coastal, a Florida corporation, which continues to insist upon a right to litigate its title dispute with Mobil, a New York corporation, in the federal courts after Mobil elected to commence this action in a Florida state court.[7]

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[5]Despite petitioner's suggestion to the contrary (Petition, p. 11), the Court of Appeals' decision does not affect any "navigation servitude" or other federal governmental interest. In the related litigation described by petitioner (Petition, pp. 11-12, n.3), Coastal initially joined the United States and the United States Army Corps of Engineers as parties. Both were dismissed on their own motion after assuring the district court that they had no interest in the litigation.

[6]Seemingly, the State of Florida is now willing to return to the position it urged upon this Court as one of 26 states appearing amici curiae in *Corvallis, supra:* ". . . federal supervision is not needed to protect the title of submerged land which vested in the States as an incident of sovereignty. As a sovereign, a State has its own courts and its own rules of property to protect its title." Brief for Amici Curiae, p. 26.

[7]Because the sole issue presented by the petition relates to subject matter jurisdiction, any detailed response to Coastal's mention of the federal court's injunction (Petition, pp. 3-4) would be inappropriate.

(continued)

REASONS WHY THE WRIT SHOULD BE DENIED

1. The Court of Appeals' holding that Florida law determines the validity of the State's conveyances of lands it allegedly acquired under the equal footing doctrine does not conflict with Smith v. Kansas City Title & Trust Co.

Petitioner's request for certiorari review of the Court of Appeals' decision boldly says that "*Smith* is indistinguishable from this case" and that "this case is controlled" by *Smith* (Petition, pp. 2, 5).[8] Those assertions merit threshold analysis of the two cases.

In *Smith* a shareholder sued to enjoin the corporation from investing in farm loan bonds on the ground that the authorizing act of Congress was unconstitutional. Although neither party questioned federal jurisdiction, this Court examined its own jurisdiction before rejecting the constitutional challenge on the merits. In sustaining jurisdiction, the majority opined:

> The objecting shareholder avers in the bill that the securities were issued under an unconstitutional law, and hence of no validity. It is, therefore, apparent that the controversy con-

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(footnote continued)

Nonetheless, two statements require correction. The 80-acre tract involved in Mobil's reply counterclaim is *not* also involved in state court litigation. Further, there was nothing to be "relitigated" in state court; there had been no adjudication of the phosphate-mining controversy in federal court when the Court of Appeals ordered remand to state court.

[8]In judging the credibility of these assertions, it is relevant to note that petitioner did not cite *Smith* in the Court of Appeals prior to that Court's decision. It is also noteworthy that the petition for certiorari ignores this Court's decision in *Corvallis*.

> cerns the constitutional validity of an act of Congress which is directly drawn in question.

255 U.S. at 201.[9]

By contrast, the Court of Appeals in the present case correctly concluded that this land title dispute is to be resolved by Florida rather than federal law. Its holding is epitomized by the following statements:

> The issue is whether, under Florida law, the 1862 deed to Mobil's predecessor conveyed the disputed property. That Florida chooses to answer this question by inquiring by what means it initially acquired title to the property does not alter the fact that this is a case in which, title having passed to the state, state law controls.
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> * * * *
>
> Our conclusion that the district court has no jurisdiction of the case comports with the fact that there is no federal interest whatever in the resolution of this controversy. Federal law is appropriately indifferent to Florida's invocation or application of a federal test of navigability *as a precondition to determining a question of state law.* (Emphasis added.)

671 F.2d at 425, 426.[10]

The dissimilarity of *Smith* and the present case is manifest.

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[9]One of the cases relied on by petitioner, *International Association of Machinists v. Central Airlines*, 372 U.S. 682 (1963), has appropriately limited the *Smith* decision: ". . . we are not dealing with a suit involving an aspect of federal law which is only collateral or remote or a case where state and federal laws are so blended as to present a serious question of the scope of the arising-under provision of § 1331 or § 1337. See Smith v. Kansas City Title & Trust Co., 255 U.S. 180, 41 S.Ct. 243, 65 L.Ed. 577 . . . ." 372 U.S. at 695-96.

[10]"The opinion earlier noted that all parties agreed Florida had acquired title to the submerged lands prior to deeding them into private

(continued)

2. The Court of Appeals' decision is fully consistent with applicable decisions of this Court.

Petitioner's thrust is that the Court of Appeals relied "primarily" (Petition, p. 4) on the dissenting opinion in *Smith* to find an absence of federal-question jurisdiction. To the contrary, the Court's opinion, fairly read, shows that *Corvallis* is the keystone of its decision. Particularly appropriate to the present issue are the quotations from *Corvallis*, 671 F.2d at 425, emphasizing that "state law governs subsequent dispositions" whether the lands at issue did or did not pass under the equal footing doctrine. The Court of Appeals further noted that "*Corvallis* foreclosed" petitioner's argument because in this case all parties concede that the State of Florida acquired title from the United States, footnote 10, *supra*.

In *Wilson v. Omaha Indian Tribe*, 442 U.S. 653 (1979), this Court placed its own interpretation on the holding in *Corvallis:*

> The Court's conclusion in the particular dispute before it in *Corvallis* was that state law governed the rights of the riparian owner because there was no claim of an applicable federal right other than the equal footing origin of the State's title.

442 U.S. at 670.[11]

(footnote continued)
ownership in 1862. Coastal and the State contended that title passed under the equal footing doctrine at statehood in 1845, whereas Mobil contended that title passed in 1850 under the Swamp and Overflow Lands Grant Act, 9 Stat. 520, now codified at 43 U.S.C. § 982.

[11]The State of Florida also joined in an amici brief in the *Omaha Indian Tribe* case, urging that "undue confusion and forum shopping would result from the application of federal law by the federal courts and state law by state courts in adjudicating title in the same geographical area." Brief for Amici Curiae, p. 18. See footnote 6, *supra*.

The result reached in *Corvallis* is compatible with this Court's earlier declaration that "what shall be deemed a navigable water within the meaning of the local rules of property is for the determination of the several states." *Donnelly v. United States*, 228 U.S. 243, 262 (1903). See also *Archer v. Greenville Sand & Gravel Co.*, 233 U.S. 60, 68-69 (1914).

Any contrary rule allowing removal of every real property dispute that collaterally involved an ancient transfer of title from the United States would represent a vast expansion of federal jurisdiction, without serving any demonstrable federal purpose. In the present case, the decision below merely adheres to the premise that a state is the sole mistress of the rules of real property within its borders.[12]

The Court's decision in *Corvallis* unmistakably answers the issue presented by petitioner. The Court of Appeals correctly interpreted *Corvallis* to mean that federal-question jurisdiction does not exist in the present case. There simply is no need to revisit the principles reaffirmed so recently by that decision.

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[12] "Under our federal system, property ownership is not governed by a general federal law, but rather by the laws of the several States." *Corvallis, supra*, 429 U.S. at 378.

CONCLUSION

The petition for a writ of certiorari should be denied.

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No. 82-379

IN THE

Supreme Court of the United States

OCTOBER TERM 1982

COASTAL PETROLEUM COMPANY,
Petitioner,

v.

MOBIL OIL CORPORATION,
THE FLORIDA DEPARTMENT OF NATURAL RESOURCES, and
THE BOARD OF TRUSTEES OF THE
FLORIDA INTERNAL IMPROVEMENT TRUST FUND,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF OF PETITIONER COASTAL PETROLEUM COMPANY

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Respondent Mobil Oil Corporation argues that the decision below is correct under this Court's opinion in *Oregon* v. *Corvallis Sand & Gravel Co.*, 429 U.S. 363 (1977). Petitioner submits that the argument misconstrues the *Corvallis* decision.

The Court held in *Corvallis* that the title to land underlying a navigable river in Oregon should be determined under principles of state, not federal, law. The Court specifically overruled its prior decision in *Bonelli Cattle Co.* v. *Arizona*, 414 U.S. 313 (1973), which had held that federal common law would govern subsequent title issues arising on lands received by a state under the equal footing doctrine. Neither *Corvallis* nor *Bonelli* presented an issue of federal jurisdiction. Both

cases dealt with substantive issues of property law, not the jurisdictional issue presented in this case.

Petitioner acknowledges that under *Corvallis* Florida real property law must be applied to decide the title issue raised by Mobil's claim. Both courts below held, however, that under Florida law the federal test of navigability must be applied to determine the nature of Florida's title to the lands involved in this aspect of the litigation and the rights of the parties in that land. While Mobil argued below that the state test of navigability should be applied, neither court accepted that argument. App. at 2a, 13a. The Court of Appeals specifically recognized that under Florida law there was a significant distinction between lands acquired by the State under the equal footing doctrine and lands acquired under the Swamp and Overflow Lands Grant Act. That court further acknowledged that in this case the distinction rested on the navigability—under federal law—of the Peace River in 1845. App. at 13a.

Both courts below followed *Corvallis* and applied Florida substantive law to decide the title dispute. Both courts held that under Florida law the decision on the title issue could turn on a determination of navigability under federal law. The two courts disagreed, however, on the significance of the fact that Florida law incorporated federal law as a determinative element. The correct resolution of that difference of opinion on the jurisdictional issue is not controlled by *Corvallis*. The *Corvallis* opinion does not decide whether a state can adopt federal law to decide property issues, nor does it decide whether a state law claim which so incorporates federal law is a claim "arising under" federal law for purposes of federal jurisdiction. This case thus raises a jurisdictional issue not presented or decided in *Corvallis*.

Mobil here attempts, in effect, to use *Corvallis* as an argument to overrule *Smith* v. *Kansas City Title & Trust Co.*, 255 U.S. 180 (1921). That argument misconstrues the nature of the issue in this case. Mobil argues that Coastal asserts a "rule allowing removal of every real property dispute that collaterally involved an ancient transfer of title from the United States. . . . " Brief in Opp. at 7. The petition does not assert any

such theory. It is not the federal source of Florida's title which gives rise to federal jurisdiction in this case but the fact that under Florida law a significant issue must be decided on the basis of the federal test of navigability. *Smith* remains the valid controlling case which supports federal jurisdiction where resolution of a state law cause of action depends on resolution of a federal law issue. *Corvallis* does not preclude application of the *Smith* rule to jurisdictional issues in real property cases. *Corvallis* states a rule of substantive law; *Smith* states a rule of federal jurisdiction. The two cases are compatible. The two decisions control separate aspects of this litigation. Mobil's attempt to blunt the fact that the Court of Appeals followed the dissent in *Smith* by trying to divert the analysis to *Corvallis* is not well founded.

CONCLUSION

For the reasons set out in the Petition and this Reply Memorandum, certiorari should be granted and the decision below reversed on the authority of *Smith*.

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